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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*,
Petitioners,

v.

METROPOLITAN DADE COUNTY, FLORIDA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

The Petitioners will address the following questions:

1. Whether a county government has the authority and competence to make findings of constitutional and statutory violations necessary to justify enactment of a race conscious ordinance which authorizes it to set aside any (and every) county construction contract for bidding exclusively by black prime contractors and to impose unlimited black subcontractor utilization goals on any construction project for an unlimited period of time.

2. Whether, consistent with the equal protection clause of the Fourteenth Amendment, a county government can rely upon studies showing "societal discrimination" against blacks (*e.g.*, lack of education or financing) and assume the existence of past racial discrimination in its contracting practices where the level of participation by black businesses in county contracts is equal to or above the percentage of local black contractors but significantly below the percentage of the county's overall black population.

3. Assuming a county government has the requisite authority and competence and makes the necessary findings of discrimination, may the county promulgate a race conscious program of unlimited black contractor goals and 100% set-asides which, facially, contains no numerical target figure, has no expiration date and does not limit eligibility for preferential treatment to local black contractors but rather encourages and permits "windfall" participation by established black contractors from throughout the United States.

4. Whether Dade County's application of its race conscious ordinance to set aside the Earlington Heights Metrorail Station project for bidding exclusively by black prime contractors and to additionally impose a 50% black

subcontractor participation goal constitutes a violation of the equal protection clause of the Fourteenth Amendment.*

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* *PARTIES BELOW*: Plaintiffs below were: the South Florida Chapter of the Associated General Contractors of America, Inc.; the Engineering Contractors Association of South Florida, Inc.; and the Air Conditioning, Refrigeration, Heating and Piping Association, Inc. a/k/a Mechanical Contractors Association of South Florida.

Defendants below were: Metropolitan Dade County, Florida; Dade County Commission members, Barbara M. Carey, Clara Oesterle, Beverly B. Phillips, James F. Redford, Jr., Harvey Ruvin, Barry D. Schreiber, Ruth Shack, Jorge E. Valdes, and Stephen P. Clark; County Manager Merrett R. Stierheim; and County Transportation Coordinator Warren J. Higgins. Thacker Construction Co., Alfred Lloyd and Sons, Inc., and the Allied Contractors Association, Inc., were permitted to intervene below as additional defendants but did not participate in subsequent appellate proceedings and are believed by petitioner to have no further interest in the outcome of this petition.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 723 F.2d 846 (11th Cir. 1984) and is reproduced in the separate Appendix to this Petition at Appendix A. The opinion of the United States District Court, Southern District of Florida, is reported at 552 F.Supp. 909 (S.D. Fla. 1982) and is reproduced at Appendix B. The Declaratory Judgment and Permanent Injunction entered by the District Court is reproduced at Appendix B at 114a-115a.[1]

JURISDICTION

The Eleventh Circuit Court of Appeals issued its opinion on January 27, 1984. Petitioners' Suggestion for Re-

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[1] References to the separate Appendix submitted with this petition will be designated as [App. —— at page number]. References to the record in the appellate proceedings below will be designated as [R. Vol. No. ——, page number]. Exhibits received in the trial court will be identified by plaintiffs' or defendants' exhibit numbers.

hearing *En Banc* was denied by order dated March 22, 1984 [App. A at 36a]. A stay of the issuance of the mandate pending petition for writ of certiorari was granted through and including May 21, 1984 [App. A at 40a]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED[2]

Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> * * * *
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> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

At issue in this case is the constitutionality of a Metropolitan Dade County ordinance and various implementing

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[2] The race conscious resolutions, ordinances and administrative regulations of Metropolitan Dade County, Florida, pertinent to this case are reproduced in full in the appendices to the Circuit and District Court opinions. They are: Resolutions No. R-1672-81 (November 3, 1981) [App. A at 21a-23a]; Ordinance No. 82-67 (July 20, 1982) (the "race conscious" ordinance) [App. A at 23a-27a]; Regulations Governing Bid Procedures Under Ordinance No. 82-67 [App. A at 27a-31a]; and Resolution No. R-1350-82 (October 5, 1982) (setting aside the Metrorail Earlington Heights contract for bidding by black prime contractors only and additionally establishing a 50% black subcontractor goal) [App. A at 31a-33a].

resolutions and administrative regulations collectively referred to as the "race conscious ordinance." [3] This local ordinance authorizes the County to set aside construction contracts for bidding exclusively by black contractors and to establish unlimited black subcontractor goals on any County contract.

The race conscious ordinance challenged by Petitioners applies to all County contracts, including federally assisted projects already having minority subcontracting requirements and contracts financed solely through County funds [App. B at 61a]. It contains no express numerical goal or target figure, has no expiration date, and is intended as a permanent part of Dade County's contracting program. Each and every County construction contract must be reviewed under the ordinance to determine whether the contract should be set aside or competitively bid subject to black subcontractor goals, or both [App. B at 61a-68a].

The only express limitation upon the County's discretionary authority under the ordinance to set aside any contract or to establish any level of black subcontractor goals is the availability of sufficient numbers of black-owned firms capable of performing necessary work. Because there are no Dade County black contractors qualified to perform major construction projects, the County measures availability on a national scale. Dade County employees actively solicit and recruit established black-

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[3] Metropolitan Dade County Ordiance No. 82-67 (July 20, 1982) (the race conscious ordinance) is reprinted in full in the Appendix to the Eleventh Circuit's decision appended hereto in App. A to 23a-27a. Adoption of the race conscious ordinance was preceded by a 1981 resolution, R-1672-81 (November 3, 1981) directing the County Manager to develop programs to maximize black participation in County contracts, appended hereto in App. A at 21a-23a. Administrative regulations promulgated to implement the set-aside and goal provisions are included in App. A at 27a-31a. Resolution No. R-1350-82 (October 5, 1982) mandating the 100% black set-aside and 50% black subcontractor goal on the Earlington Heights Metrorail Station contract is reprinted in App. A at 31a-33a.

owned construction firms from outside Dade County and the State of Florida to open places of business in the County (even a post office box or residence address) in order to qualify for preferential treatment under the set-aside and goal programs [App. B at 96a-98a, n. 39].

There is no procedure under the ordinance whereby adversely affected white or non-black minority contractors can seek a waiver of the County's determination that a particular contract is to be set aside for black contractors [App. B at 101a, 105a, n. 49]. Nor is there any procedure whereby adversely affected non-black subcontractors can challenge unjust subcontractor participation or a County determination setting black subcontractor goals. A general contractor unable to meet black subcontractor goals can seek a waiver based upon good faith compliance efforts [App. B at 105a].

I. Procedural Background

Petitioners, plaintiffs/cross-appellants below, are construction industry trade associations comprised primarily of white and non-black minority prime contractors and subcontractors which regulary perform work on construction projects of Metropolitan Dade County, Florida [App. B at 45a-46a]. Petitioners (hereinafter the "Trade Associations") initiated this action challenging the constitutionality of the race conscious ordinance in November, 1982, pursuant to 28 U.S.C. § 1343. Declaratory and injunctive relief were sought under 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. §§ 2201 and 2202. Also challenged [4] was the constitutionality of Dade County's initial application of the ordinance to set aside the six million dollar Earlington Heights Metrorail Station contract for bidding

[4] The Trade Associations also challenged the County's authority to waive open competitive bidding under Florida law pursuant to the District Court's pendent jurisdiction. Although there is no Florida case precisely on point, the District Court held that the County could waive competitive bidding requirements for any purpose it felt was "in the best interests of the County" [App. B at 80a].

exclusively by black prime contractors and the imposition, in addition to the set-aside, of a 50% black subcontractor participation goal [App. B at 34a-44a].

After hearing, the District Court temporarily enjoined award of the Earlington Heights contract and set the matter for trial on an expedited basis [App. B at 44a]. Following a full day's trial on the merits, the District Court invalidated as unconstitutional the set-aside provisions of the ordinance, both facially and as applied, primarily because they contained no waiver provision and because the County's asserted intention of terminating the program once the percentage of construction contracts awarded to blacks mirrored the County's black population made the racial preference essentially permanent in nature [App. B at 96a-102a]. In contrast, the District Court upheld the goals provisions and their application because they contained a waiver provision and because the 50% goal was not unreasonable "in light of the racial realities that presently exist in Dade County" [App. B at 102a-110a].

The United States Court of Appeals for the Eleventh Circuit reversed, holding the set-aside and goals provisions constitutional, both facially and as applied to the Earlington Heights contract. The appellate court based this conclusion primarily on its view that the County's establishment of a three-tiered system for reviewing racially exclusionary contracts[5] and the annual reassessment of the program required by the ordinance established adequate procedural safeguards to ensure that the racial preferences were limited to their remedial purposes. The ab-

[5] Racial goals and set-asides for particular contracts must be approved by the County Manager, the County's Contract Review Committee made up of County employees, and the Board of County Commissioners. The criteria for approval are the availability of black contractors, the racial goals of the particular County department awarding the contract and, in the case of a set-aside, the Board's determination that such action would be in the best interests of the County [App. A at 13a-15a].

sense of any overall goal, duration limit and set-aside waiver provision and the availability of less discriminatory alternatives were held not to invalidate the County's program [App. A at 14a-16a]. Also, the absolute set-aside for black contractors on the Earlington Heights project was not excessive, in the court's view, because the contract constituted only 1% of the County's annual contractual expenditures [App. A at 17a-19a]. Finally, the court cautioned that its "conclusions on the adequacy of the program's safeguards are premised on the assumption that the review process . . . will be conducted in a thorough and substantive manner" [App. A at 15a-16a].

The evidence presented at trial of the findings and conclusions relied upon by the County in enacting and applying the race conscious ordinance is of the utmost importance in reviewing the County's justification for its racial preference program and the scope of the remedy selected. After careful consideration of these facts the District Court determined that although the County's findings were sufficient to allow some form of race conscious remedy,[6] they were insufficient to justify the overly broad scope and duration of the set-aside provisions of the ordinance. The Eleventh Circuit disagreed and reversed. The following summary is provided to enable this Court to understand the circumstances under which the ordinance was enacted and first applied.

II. Factual Background of the Race Conscious Ordinance

Race riots occurred in Miami's Liberty City area in May, 1980. Reports generated by various studies and

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[6] The District Court acknowledged that societal discrimination was the probable cause of the low number of black construction firms in the County but still found what it felt was "identified discrimination" sufficient to warrant race conscious remedies. The Court relied upon the history of race discrimination in the construction industry nationally, the low number of black construction firms compared to the black population, and the correspondingly low number of County contracts awarded to blacks to conclude that black firms were suffering the "present effects of past discrimination" [App. B at 75a-76a].

investigations[7] into the underlying causes primarily attributed the civil disturbances to the continuing effects of past "societal discrimination" (*e.g.*, poverty, unemployment, inadequate housing, the failings of the criminal justice and educational systems, etc.) [App. B at 50a-53a, 75a].

In relation to the construction industry, statistical investigations based upon 1977 census data[8] established that black contractors and subcontractors comprised approximately 1% of all construction firms in the Dade County area; whereas, black citizens constituted approximately 17% of the County's population [App. B at 49a-50a]. A study conducted by an in-house County group estimated that black contractors had been awarded 1.4% of the dollar value of all *non-federally assisted* County construction contracts in the years 1977-1980. The County group deliberately did not include in its study any construction contract involving federal funding "because we knew there were already guidelines and criteria under federal contracts for minority businesses" [R. Vol. 5 at pp. 356-357, 377-378].

Another study—the "Janus Report,"[9] focused more directly upon the economic situation in the black community of Dade County, finding that black businesses generally lagged far behind white and hispanic business

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[7] "Report of the Governor's Dade County Citizens Committee" (October 30, 1980) [Def. Comp. Ex. No. 6(4)(c)]; Report of the United States Commission on Civil Rights "Confronting Racial Isolation in Miami," (June, 1982) [Def. Comp. Ex. No. 6(7)].

[8] The reports referred to were "Black Business Disparity Study," prepared by the Metropolitan Dade County Disparity Study Group Task Force (October 27, 1981) [Def. Comp. Ex. Nos. 6(2) and (3)]; and "Black-Owned Businesses in Metropolitan Miami, A Statistical Analysis of U.S. Census Data" prepared by Tony E. Crapp, Sr. (December, 1980) [Def. Comp. Ex. No. 6(4)(a)].

[9] "An Economic Adjustment Plan for the Civil Disturbance Areas of the City of Miami and Dade County," prepared by Janus Associates (May, 1981) [Def. Comp. Ex. No. 6(4)(b)].

development. This economic condition was attributed to the black community's lack of the tools of development necessary for economic growth, including lack of capital and minimal entrepreneurial development. The report warned that the black community remained explosively volatile due to its perception that blacks had not shared equitably in the economic growth of the County. It recommended, *inter alia*, development of affirmative action and set-aside programs to maximize the opportunities of black-owned businesses in the public sector [App. B at 51a-53a].

A. *The "Race Conscious" Resolution*

On November 3, 1981, the Dade County Commission relied upon the above reports in adopting Resolution No. R-1672-81.[10] The Commission attributed the disparity between the number of black-owned businesses in the County (1%) and the County's black population (17%) and the correspondingly low percentage of County construction contracts awarded to black firms to "the long-standing existence and maintenance of barriers impairing access by black enterprises to contracting opportunities" [App. A at 22a]. Neither the studies nor the resolution identified any specific artificial barriers or past discrimination against black construction contractors [App. B at 74a-77a]. The resolution sought to remedy past discrimination by directing development and implementation of County-wide programs, "*including specific race conscious measures*," to maximize the number of County contracts awarded to the black business community.

B. *Pre-Ordinance Race Conscious Efforts to Increase Black Participation in County Construction Contracts*

Dade County's major construction activity from 1979 through November, 1982 was the billion dollar "Metrorail" mass transit system, financed through federal grants from the Urban Mass Transportation Administration

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[10] Reprinted in App. A at 21a-23a.

("UMTA") along with state and local funds. Pursuant to UMTA grant conditions,[11] the County was required to and did establish an overall minority business enterprise (MBE) participation goal of 16.5% of the total dollar value of all Metrorail and related contracts.

As the phases of Metrorail construction progressed, MBE participation goals escalated from approximately 5% on early procurement contracts to 20-25% on line section construction contracts and eventually, to 40-45% on station construction contracts. As of September 30, 1982, County MBE and minority employment programs had achieved results which exceeded federal guidelines. MBE contractors and subcontractors received more than 20% of the dollar value of all work performed on the Metrorail project, including approximately 7% awarded to black-owned firms. Of the sixteen (1,600) hundred workers employed in the Metrorail construction on September 30, 1982, 53% were minorities, including 36% black employees (black workers comprise only 22% of the County's construction or blue collar work force) [App. B at 57a].

Black contractor participation in the Metrorail project as of 1982 had not been limited to subcontractors. Thacker Construction Co., an experienced, well-financed black prime contractor from Illinois was specifically recruited by the County to engage in competitive negotiations for the construction of the Metrorail North Bus Maintenance Facility project. Thacker was awarded the contract on this project in the amount of ten to eleven million dollars [R. Vol. 5, pp. 173, 195-196, 213-214; App. B at 48a].

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[11] United States Department of Transportation Minority Business Enterprise Regulations, 49 C.F.R. Part 23, define minority businesses as those owned and controlled by blacks, hispanics and other racial and ethnic groups.

C. *Pre-Ordinance Efforts to Award the Earlington Heights Contract to a Black Prime Contractor*

The Earlington Heights Station, located within a black neighborhood, was the last of the twenty (20) Metrorail stations to be built. Although originally scheduled to be bid as part of a five (5) station package, the station was established as a separate contract to be awarded through the same "competitive negotiation" procedures which previously resulted in award of a Metrorail prime contract to a black contractor [App. B at 57a]. Newspaper reports characterized this action as a commitment to the black community that the station would be awarded to a black contractor [Pl. Ex. Nos. 6-9].

At the time it recommended separate competitive negotiation of the Earlington Heights contract, the County's Transit Oversight Committee, which included between four (4) and six (6) County Commissioners, was fully aware that there were no Dade County black prime contractors which could qualify for the project [App. B at 77a; Pl. Ex. 23 at p. 5].

On July 21, 1982 (one day after the County adopted the race conscious ordiance) proposals were received on the Earlington Heights Station contract. A non-black prime contractor tendered the lowest price, which was more than two (2) million dollars lower than the next lowest offer proposed by a black prime contractor. No other proposals were received by the County [App. B at 68a-71a].

D. *The Adoption of the Race Conscious Ordinance*

On July 20, 1982 (one day before receipt of the original proposals for competitive negotiation of the Earlington Heights contract), the County adopted its race conscious ordinance and implementing regulations. The County Commission subsequently accepted the County Manager's recommendation that all proposals received on the Earlington Heights contract be rejected and that the

contract be re-bid under the terms of the newly adopted race conscious ordinance [App. B at 71a].

After review pursuant to the administrative regulations, the County Manager and the County's in-house Contract Review Committee (CRC) concluded that because at least three (3) black prime contractors were available, the Earlington Heights contract should be set aside for competitive bidding exclusively among black contractors. They also recommended, based upon black subcontractor availability, an additional 50% black subcontractor goal. As the final tier in the three steps review process, the County Commission adopted Resolution No. R-1350-82 on October 5, 1982, finding that waiver of open competitive bidding was "in the best interests of the County" and directing implementation of the set-aside and goal recommendations [App. B at 71a].

On November 17, 1982, two (2) bids were received on the Earlington Heights Station contract from black prime contractors. The unopened bid packages were placed in the custody of the District Court pursuant to the temporary restraining order and were subsequently returned unopened to the two bidders [App. B at 74a].

REASONS FOR GRANTING THE WRIT

The decision below upholds the constitutionality of a Dade County ordinance which allows the County to set aside any County construction contract for black prime contractors only and to establish unlimited black subcontractor goals on any County construction contract for an indefinite period of time. Established black-owned construction firms from throughout the United States which were never disadvantaged by the County's contracting practices qualify for windfall preferential treatment under the ordinance at the expense of local black and non-black contractors. Although not specified in the legislation, the courts below accepted unwritten assurances of local officials that the program will remain in effect only

until the percentage of contracts awarded to black firms equals the percentage of blacks in the local population. The guarantee of equal protection of the law has thus been suspended in Dade County for an indeterminate period of years or decades with the full approval of the Eleventh Circuit Court of Appeals.

The Trade Associations submit that the local race conscious legislation at issue in this case goes far beyond the one year, 10% minority subcontractor goal approved in this Court's opinions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The fact that the Dade County program approved below has all of the faults and none of the safeguards relied upon in upholding the Congressional enactment should compel an end to this Court's four year silence regarding the scope of the constitutionally permissible race conscious legislation. Failure to grant review will allow the decision below to serve as precedent before lower courts and local governments alike for the proposition that any city or county having simple municiple legislative authority is now free to pursue its own peculiar ideas of social (or political) engineering to remedy perceived disparate treatment of any racial or ethnic group.[12]

The Trade Associations thus submit that the Eleventh Circuit Court of Appeals has decided an extremely important issue of federal constitutional law in a way which conflicts with the intent of the Court as expressed in *Fullilove, supra.* Further, because the decision below is attributable in large measure to the confusion which prevails in the judicial and legislative branches of government regarding the standards to be derived from *Fullilove, supra,* and *Regents of the University of California*

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[12] As was noted by Justice Stevens in his dissent in *Fullilove, supra,* the quota concept is not limited to the area of public contracting, but could as well be logically extended to apply "in the electoral context [to] support a rule requiring that at least 10% of the candidates elected to the legislature be members of specified racial minorities," 448 U.S. 547 (Stevens, J., dissenting).

v. Bakke, 438 U.S. 265 (1978) the writ should be granted to allow the Court to settle the important questions of federal law presented herein.

I. THE JUDGMENT BELOW SHOULD BE REVIEWED BECAUSE THE LOWER COURT SUBSTANTIALLY DEPARTED FROM THE STANDARDS OF *FULLILOVE, SUPRA,* BY HOLDING THAT A LOCAL GOVERNMENT RACE CONSCIOUS PROGRAM INVOLVING 100% BLACK PRIME CONTRACTOR SET-ASIDES AND UNLIMITED BLACK SUBCONTRACTOR GOALS WAS JUSTIFIED BY PRESUMPTIONS OF PAST DISCRIMINATION AND SELECTIVE RELIANCE UPON A STATISTICAL DISPARITY BETWEEN THE PERCENTAGE OF LOCAL BLACK CONTRACTORS AND THE LOCAL BLACK POPULATION.

In their respective opinions below, both the District and Circuit Courts complained of the lack of clear standards under which to review Dade County's race conscious ordinance [App. A at 7a-8a; App. B at 82a, 90a-92a]. The District Court relied primarily upon the standards enumerated in Justice Powell's concurring opinion in *Fullilove, supra,* in holding that local government race conscious programs must be strictly scrutinized.[13]

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[13] Numerous court decisions and law review commentaries issued since this Court's decisions in *Fullilove* and *Bakke, supra,* have also noted the dire need for additional guidance on this extremely important issue of federal law. But a few examples are: Van Benthuysen, Minority Business Enterprise Set Aside; The Reverse Discrimination Challenge, 45 Alb. L. Rev. 1139, 1176 (1981); Lavinski, The Affirmative Action Trilogy and Benign Racial Classification—Evolving Law in Need of Standards, 27 Wayne L. Rev. 1 (1980); Richards, Equal Protection and Racial Quotas: Where Does *Fullilove v. Klutznick* Leave Us?, 33 Baylor L. Rev. 601 (1981); *Schmidt v. Oakland Unified School District*, 662 F.2d 550, 556 (9th Cir. 1981) (holding a school board competent to make findings and upholding minority contractor goals based upon disparities between the number of local minority contractors and the general population), *vacated on other grounds*, 457 U.S. 594 (1982); *M.C. West,*

It noted, however, that other courts had applied less stringent criteria in similar situations [App. B at 91a-92a].

The Eleventh Circuit rejected this approach, observing that "[i]n light of the diversity of views on the Supreme Court, determining what 'test' will eventually emerge from the Court is highly speculative" [App. A at 10a]. Based upon this lack of guidance, the appellate court felt free to develop a hybrid standard grounded upon what it perceived as the factors common to all of the diverse views expressed in *Fullilove, supra.* Judge Kravitch, writing for the Eleventh Circuit panel, expressed the view that there was no clear "plurality" or controlling opinion in *Fullilove* [App. A at 8a, n.7].

As shown by the decision below, the broad standard of review adopted by the Eleventh Circuit essentially requires less of a showing of compelling interest and fewer built-in safeguards for local government programs than this Court did of Congress, providing for consideration of only three broadly stated factors:

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination. [App. A at 10a (emphasis in original)].

Inc. v. Lewis, 522 F.Supp. 338, 342 (M.D. Tenn. 1981); *United States v. City of Miami*, 614 F.2d 1322, 1377 (5th Cir. 1980); *rev'd on rehearing*, 664 F.2d 435 (1981) (en banc); *Williams v. City of New Orleans*, 694 F.2d 987 (5th Cir. 1982), *rev'd on rehearing*, —— F.2d ——, 34 Fair Empl. Prac. Cas. (BNA) 1009 (April 23, 1984) (en banc); *Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir. 1983), *reh. denied*, 712 F.2d 222 (1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984).

Although framed as a three-step process, the Eleventh Circuit's review criteria essentially eliminates meaningful inquiry into the authority and competence of local government units to make findings of statutory and constitutional violations by holding that such questions are determined based upon state law.[14] The lower courts concluded that the simplest municipal legislative powers were sufficient to confer the requisite authority and competence. Thousands or tens of thousands of similarly empowered city and county governments throughout the nation have therefore been held to possess the necessary authority to enact similar race conscious legislation.

The analytical framework adopted by the lower court is thus reduced to a two step test limited to the adequacy of the findings and the scope of the remedy selected. Proper application of even these overly broad standards would have required invalidation of the entire race conscious ordinance in this case because the findings relied upon by the County were inadequate to show a need for *additional* remedial measures above and beyond those already in place. Further, as discussed *infra*, the scope of the remedy selected by the County substantially exceeds the stated objective of eliminating the present effects of past discrimination against Dade County black contractors.

The problem in this case is that the lower courts failed to recognize any difference between the "paramount" powers of Congress and the authority of purely local gov-

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[14] Significantly, the question of the authority of a local government to make legal and factual findings of constitutional and statutory violations and to enact remedial legislation must be determined, in the Eleventh Circuit's view, solely under state law [App. A at 11a-12a]. Under this Court's recent decision in *Pennhurst State School & Hospital v. Haldeman*, —— U.S. ——, 52 U.S.L.W. 4155 (January 23, 1984), federal courts may thus be deprived of jurisdiction to determine the issues of local authority and competence.

ernments in the area of race conscious remedial legislation. The various opinions in *Fullilove, supra,* clearly hold that Congress need not develop as detailed a legislative record in enacting a race conscious remedy as might be required of a court or administrative agency. However, as noted by Justice Powell in his concurring opinion in *Fullilove, supra,* the fact that a congressional set-aside was upheld based upon a minimal legislative record did not mean "that the selection of a set-aside by any other governmental body would be constitutional. *See Bakke,* 438 U.S. at 309-310. The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." *Fullilove, supra,* 448 U.S. at 515-516, n.14 (concurring opinion of Powell, J.).

In *Bakke, supra,* this Court dealt with what is possibly the lowest level of government, an appointed board; whereas, *Fullilove* involved review at the opposite end of the spectrum of an act of Congress. The Eleventh Circuit, relying upon *Ohio Contractors Association v. Keip,* 713 F.2d 167 (6th Cir. 1983), concluded that this Court did not mean that all intermediate governmental units were incompetent and therefore powerless to redress past discrimination. However, it entirely disregarded this Court's clear instruction that the applicable standard for review of race conscious legislation must become increasingly strict as one travels down the overall scale of governmental authority. Where the governmental body involved, as in this case, is a municipal legislative body on the low end of the scale, the findings upon which a race conscious remedial program is premised and the scope of remedy selected must be subjected to substantially stricter scrutiny than would be applied to an act of Congress.

The lower courts herein accepted the arguable proposition that any local government having simple municipal legislative powers can make findings and fashion a legis-

lative remedy which confers or takes away benefits or opportunities based solely upon race. This conclusion obviously affects every city and county government in the nation.

In view of the thousands of legislative bodies now authorized to enact race conscious schemes, the only conceivable means of enforcing the guarantee of equal protection of the law is to insist upon adherence by lower courts to the requirement that local government race conscious programs meet the strictest possible constitutional tests. Findings of past racial discrimination must show substantially more than mere disadvantage based upon societal discrimination. Built-in safeguards equal to or greater than those required of Congress in *Fullilove, supra,* cannot simply be promised by local officials or implied by the courts, but must appear on the face of the legislative enactment in order to ensure that local race conscious programs cannot be arbitrarily extended beyond their stated remedial objectives. The overly discretionary review criteria erroneously adopted and applied by the lower court does not accomplish this objective and should be rejected by this Court.

A. The Lower Court Improperly Concluded That Mere Disparity Between The Percentage Of Blacks In A Particular Profession Or Occupation And The Percentage Of Blacks In The County Population Was Sufficient Justification For The County's Race Conscious Set-Aside And Goal Programs.

The lower court held that a constitutionally permissible local race conscious program must be predicated upon findings adequate to "ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another" [App. A at 10a]. Such findings form the basis from which the courts can determine (1) whether statutory or constitutional violations have actually occurred in order to evaluate the need for the race

conscious measure, and (2) whether the remedy selected is narrowly tailored to the identified problem.

The Eleventh Circuit, having broadly stated the rule in this case chose instead to accept without analysis or discussion the District Court's conclusion that "identified discrimination" was shown by the history of race discrimination in the construction industry nationally and the disparity between Dade County's percentage of black contractors and black population.[15] These findings were held sufficient to justify the entire race conscious program, both facially and as applied.

The Trade Associations emphatically submit that mere disparities between a local racial or ethnic population and the percentage of members of each group in a particular trade or profession can never be accepted by the courts as "identified discrimination" sufficient by itself to warrant local race conscious legislation. Although black citizens may comprise 17% of the County population, it is highly doubtful that the percentage of black doctors, florists, gas station operators or any other trades mirror the population. That such disparities may exist does not prove that race discrimination is their underlying cause.

The term "identified discrimination" as used in *Bakke, supra*, and in Justice Powell's concurring opinion in *Fullilove, supra*, relates to factual and legal findings of actual constitutional or statutory violations [*Bakke, supra*, 438 U.S. at 307; *Fullilove, supra*, 448 U.S. at 498 (Powell, J., concurring)]. In this case, however, the District Court admitted that the evidence at trial did not establish any specific discrimination against black contractors

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[15] The District Court rejected the Trade Association's contention that the proper benchmark required comparison of the percentage of qualified Dade County black contractors (*i.e.*, the work force) and the percentage of County contracts awarded to black firms. It noted that this Court had permitted Congress to rely upon population comparisons in *Fullilove, supra* [App. B at 106a, n.50].

by either the County or non-black contractors. No study relied upon by the County identified any *artificial* barrier in the County's contracting practices. Those barriers which were identified (*i.e.*, inadequate capital, lack of experience and bonding capacity, etc.) related to the actual *qualifications* demanded of all public contractors in order to protect the public.[16]

Notwithstanding these conclusions, the courts below found that the disparity between the percentage of black construction firms in Dade County (1%) and the percentage of black citizens in the County population (17%), coupled with the "negligible" percentage of County construction contracts awarded to black contractors (1.4%) was evidence of "identified discrimination" sufficient to ensure that the County was remedying the present effects of past discrimination. No precedent was or could be cited for this conclusion apart from this Court's approval of congressional population comparisons in *Fullilove, supra.*

Identified discrimination, in the context of *Fullilove* and *Bakke, supra,* must be limited to its plain meaning and cannot be transformed by local governments or the courts into a term of art. True "identified discrimination" might have been shown by proof of racially discriminatory County licensing examinations or artificial barriers in qualifying to compete for County contracts. Likewise, proof of discriminatory refusal by non-black contractors to subcontract work to black-owned firms might justify a race conscious remedy *but there is no such evidence in this case.*

The "unique" powers of Congress might require this Court to defer to broad congressional assumptions re-

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[16] *See, e.g.*, Section 255.05, Florida Statutes (1981), requiring contractors on public construction projects to obtain payment and performance bonds on all contracts over $25,000.00. Chapter 82-196, Laws of Florida (1982), increased the discretionary threshold amount to $100,000.00.

lated to population disparities. Similar judicial laxity in reviewing the findings asserted in support of a local government race conscious legislation cannot be permitted. Findings of racial or ethnic disparities similar to those held sufficient in this case could be easily and selectively compiled by any local government in order to justify otherwise unwarranted preferential treatment of any group.

The Eleventh Circuit's interpretation of *Fullilove, supra*, as authorizing local governments, rather than Congress alone, to enact remedial legislation based upon broad and inconclusive disparity evidence must be rejected. Any other action by this Court will encourage and permit unprecedented social (and political) engineering by local governments through racial or ethnic quotas. Local legislation purportedly compelled by the need to advance one racial or ethnic group to its rightful population percentage in a particular trade or vocation would necessarily be followed by new legislation to correct the disparity created by the prior program, *ad infinitum*. The final result would be to permit the cyclical infliction of the most egregious constitutional injuries under the guise of remedial relief.[17]

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[17] Hispanics were engaged in the construction business in numbers six times greater than the number of black-owned construction companies and comprised 41% of the County's population. Hispanics are also among the disadvantaged minorities recognized by federal MBE programs and were one of the groups found to have suffered discrimination in *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). Accordingly, under this criteria the County could justify setting aside construction contracts until Hispanic contractors received their rightful share equal to local population statistics. The concept could also be applied to County Commission seats, jury pools, County employment and other opportunities. The County's decision not to rely upon disparity statistics to aid Hispanic construction business development shows the blatant inadequacy of the data relied upon to establish a compelling need to assist black contractors.

In this case, population disparity evidence was the sole basis, apart from presumptions of national employment discrimination, relied upon by the lower court as justification for the County's race conscious ordinance. Accordingly, the court erred in concluding that the findings relied upon by the County provided a sufficient predicate for race conscious remedial action.

B. Even If The County's Findings Were Sufficient To Justify Some Form Of Race Conscious Remedial Action, They Were Insufficient To Ensure That The County Was *Remedying* Past Discrimination In View Of The Other Race Conscious Measures Already In Effect.

Review of the findings made by a governmental unit in support of a remedial race conscious program requires two essential tests. First, as noted above, the findings must identify an actual problem resulting from constitutional or statutory violations related to racial discrimination. Second, the findings must establish a compelling governmental need to enact a remedy for the *present* effects of such past discrimination.

In this case, even if the disparity statistics and the history of past employment discrimination in the construction industry nationally provided sufficient justification for some form of race conscious remedial action, there was no showing of a compelling need for County race conscious measures in addition to other measures already in effect, at the time the ordinance was enacted.

The District Court concluded that disparity findings justified the goals provisions of the ordinance but were insufficient to sustain the constitutionality of the *race exclusive* set-aside provisions. It did so in recognition of the fact that the other race conscious programs already in place, including MBE subcontractor goals, the County's ten million dollar bond guarantee program for black contractors, competitive negotiation of prime contracts and other measures had significantly increased the per-

centage of County contracts awarded to black firms prior to adoption of the set-aside program.

The record amply supports the District Court's conclusions. The County asserted a compelling need to enact the ordinance and to set aside the Earlington Heights Station contract to ensure that at least one Metrorail prime contract would be awarded to a black contractor. However, the County had already awarded the multi-million dollar prime contract on the North Bus Maintenance Facility to Thacker Construction Co., a black contractor, prior to enactment of the race conscious ordinance or its application to set aside the Earlington Heights contract. Black subcontractors, which comprised 1% of all Dade County construction firms, had received 7% of the total value of the billion dollar Metrorail project prior to enactment of the ordinance. In short, the system was achieving its intended results without the need for the *race exclusive* set-aside.

The Eleventh Circuit disagreed, holding that the disparity findings justified the goals *and* the set-aside, both facially and as applied. In its view, the fact that "only 7%" of all Metrorail contracts had been awarded to black contractors was further evidence of the need for the set-aside [App. A at 19a, n.14].

The Trade Associations submit that neither court correctly interpreted the weight to be given the disparity evidence in this case in determining the need for the race conscious ordinance at the time of its enactment. A contracting system which results in 1% of available contractors receiving 1.4% of County contracts is precisely (or slightly better than) the result which could be expected in the complete absence of past discrimination.[18]

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[18] Even this assumption is flawed by the County's failure to consider any federally assisted construction contract subject to minority subcontractor participation goals (*e.g.*, the UMTA contracts and Public Works Employment Act of 1977 funds at issue in *Fullilove, supra*) in its study of contracts awarded from 1977-1980 [R. Vol. 5 at pp. 356-357].

As noted by the District Court, a system which results in 1% of available black contractors receiving 7% of available work shows substantial affirmative action. Therefore, even assuming that the disparity justified some form of remedial action, it did not justify any *County* race conscious action in 1982 *in addition to* the federal and local measures already in effect.[19]

There was no compelling need for the extreme set-aside and goals authorized by the race conscious ordinance at the time of its enactment. There was likewise no compelling need to completely exclude non-black prime contractors from the opportunity to bid on the Earlington Heights contract, nor was there a need for the 50% black subcontractor goals. In the absence of such justification, the lower courts erred in failing to hold the entire race conscious ordinance unconstitutional.

II. REVIEW SHOULD BE GRANTED BECAUSE THE LOWER COURT IMPROPERLY DEFERRED TO THE COUNTY IN DETERMINING THAT THE BLACK CONTRACTOR SET-ASIDE AND BLACK SUBCONTRACTOR GOAL PROVISIONS OF THE RACE CONSCIOUS ORDINANCE WERE NARROWLY TAILORED TO THE STATED OBJECTIVE OF ASSISTING DADE COUNTY BLACK CONTRACTORS OVERCOME THE PRESENT EFFECTS OF PAST DISCRIMINATION.

Even if the County had the requisite authority and had made adequate findings of past discrimination against Dade County black citizens, the scope of the remedy selected by the County unreasonably and unneces-

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[19] The original specifications for competitive negotiation of the Earlington Heights contract required not less than 44% minority contractor participation [App. B at 107a-108a]. The County had the option of "taking race into account" by encouraging contractors to comply with the federal MBE goal through utilization of black subcontractors. This method would have complimented the federal requirements while still allowing fulfillment of the County's stated remedial objective.

sarily exceeds the legitimate objective of assisting Dade County black contractors overcome the present effects of past discrimination. Although, *Fullilove, supra,* involved what the Court referred to as a "set-aside," the remedy held there to "press the outer limits of congressional authority" was actually a flexible goal equipped with exhaustive administrative waiver provisions. *Fullilove, supra* at 490. In this case, possibly for the first time, the Court must address a true "set-aside"—a position or opportunity for which whites and non-black minorities need not apply.

The racial discrimination involved in setting aside a particular contract for black firms is effected directly by Dade County. It is not remote, as in *Fullilove, supra,* where government grantees encouraged prime contractors to seek out and utilize a given percentage of minority firms and could grant waivers if good faith efforts did not result in meeting the desired goal. Here, County employees make recommendations and the elected County Commission makes a final decision to set aside a particular contract for black contractors based upon the availability of at least three (3) qualified black firms and "the best interests of the County." There are no waivers and no appeals.[20]

The ordinance contains no target figure, overall goal or other means of determining how many contracts should be set aside or when the program is no longer necessary. Assuming availability, the County could immediately set aside *all* County construction contracts for black contractors only. In the alternative, it could allow the program to linger for decades, setting aside contracts whenever politically expedient.

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[20] This case shows that the County's allegedly exhaustive administrative procedures are plainly inadequate because only two bids were received from black contractors on the Earlington Heights contract.

In summary, the Eleventh Circuit in this case has approved a local government race conscious remedy which the plurality opinion authored by Justice Burger in *Fullilove, supra,* indicates could not be upheld even if enacted by Congress. In so ruling, the Eleventh Circuit "decline[d] to hold the ordinance facially unconstitutional, however, merely on the speculation that the county will not vigorously undertake implementation of the review procedure" [App. A at 16a]. It thus entrusted the constitutional rights of non-black contractors to the discretionary judgment and presumed good faith of County officials by approving an ordinance which authorizes those officials and politicians to violate such rights at will.

The Fourteenth Amendment was specifically intended as a limitation upon the authority of state and local officials to enact racially discriminatory laws. The judgment below negates this protection, suggesting instead that the Constitution allows the federal courts to refuse to invalidate facially unconstitutional local legislation on the grounds that local officials and politicians can be trusted. Such deferral conflicts in all respects with this Court's opinions in *Bakke* and *Fullilove, supra.* Constitutional protections cannot "vary with the ebb and flow of political forces," *Bakke, supra,* at 299.

A. The Set-Aside Provisions Of The Race Conscious Ordinance Intentionally Permit Windfall Participation In The Remedial Racial Preference Program By Out-Of-State Black Firms At The Expense Of Local Black And Non-Black Contractors.

The most egregious constitutional deficiency of Dade County's race conscious remedy is its failure to even attempt to limit preferential treatment to black contractors which have suffered impaired competitive positions based upon past racial discrimination by the County. Instead, the Dade County ordinance creates an irrebuttable presumption that *all* black contractors, including established, well-financed firms from Illinois, Ohio, Pennsylvania, and

Kansas [R. Vol. 5 at pp. 236-239] have been damaged by past racial discrimination and are therefore presently entitled to preferential access to County construction work. The remedy selected is national in scope. Because black contractor set-asides are limited only by availability of black firms and because availability is determined on a national scale, this alleged limitation on the County's authority is entirely illusory. Perpetuation of the remedy will create a sheltered market of windfall racial preferences for black firms never conceivably affected by Dade County contracting practices.

This argument is not intended to imply that otherwise proper remedial race conscious legislation must be limited to "make whole" relief for local black contractors which can document specific incidents of racial discrimination in past years. Narrowly drawn class based relief can be legislatively effected in proper circumstances by Congress, and arguably, by lesser governmental units. However, the class intended to be benefited by local remedial legislation cannot include all black contractors in the nation as it does in this case.

A more disturbing impact of the remedy approved by the Eleventh Circuit is that it defeats its legitimate purpose of assisting local black contractors in overcoming the alleged effects of past discrimination. Although local black firms are eligible to bid on set-aside contracts and contracts subjected to black goals, it is unlikely that truly disadvantaged local firms could compete effectively against otherwise competitive out-of-state firms owned by blacks.

The record below conclusively shows that County employees spent public funds to travel throughout the United States actively soliciting and recruiting established black firms to take advantage of the racial preferences provided by the ordinance. Prior to enacting the ordinance, the County was fully aware that there were

no Dade County black contractors which could qualify for major construction projects. The County therefore could not have intended to benefit local black firms through the set-aside provisions of the ordinance or by setting aside the Earlington Heights contract. The intended beneficiaries of the racial preference were clearly the out-of-state firms recruited to participate in the remedial program. The District Court acknowledged this, observing that apart from symbolism the practice did not "seem to involve any tangible benefits per se for the local Black business community" [App. B at 98a, n.39]. The appellate court did not even mention this deficiency, apparently concluding that a local race conscious program having national remedial objectives was constitutionally permissible.

The remedy established by the County is not narrowly tailored in any respect. As determined by the District Court, the set-aside is merely a provision which prefers one race over another. Accordingly, even if this Court cannot agree upon uniform standards for local race conscious legislation, it should still act to vacate the Eleventh Circuit's decision in this case.

B. The Goals Provisions Are Not Narrowly Tailored To Redress The Present Effects Of Past Discrimination Because They Also Permit Windfall Participation In The Remedial Preference Program By Out-Of-State Subcontractors And Allow Unlimited Black Goals On All County Construction Projects For An Unlimited Period Of Time.

The District Court concluded that the goals provisions of the ordinance suffered from the same constitutional deficiencies as the set-aside [App. B at 104a-106a]. They contain no overall goal, target percentage or durational limit and are thus a permanent part of the County's contracting program. There is no external means of determining when the goals will or should end nor is there any limitation, apart from availability of black subcontrac-

tors, upon the amount of work the County can allocate to black firms. Because availability of subcontractors is also determined on a national scale, the County could immediately set and enforce unreasonable 25%, 50% or 75% black subcontractor goals on all contracts under the ordinance.

In deciding to uphold the goals provisions notwithstanding these deficiencies, the District Court concluded that racial goals are a presumptively permissible means of remedying past discrimination under *Fullilove, supra.* Relying upon this presumption of constitutionality, it held that the actual percentage chosen by the County was purely a matter of discretion. Finally, the District Court pointed to lack of effective alternatives and the waiver provisions applicable to goals as factors allowing sufficient flexibility to distinguish the goals from an impermissible quota.

The lower courts erred in upholding the goals provisions as a narrowly tailored remedy. This Court's opinion in *Fullilove, supra,* do not support any presumption that locally imposed black subcontractor goals are constitutionally permissible. A federal court therefore cannot defer to a local racial goal merely because it can perceive a rational basis for its imposition.

Further, the irrebuttable presumption of disadvantage and entitlement to preferential treatment applies in the case of goals to permit windfall benefits to established out-of-state black subcontractors. Unlike *Fullilove, supra,* there is no procedure whereby a local black or other subcontractor can challenge unjust participation in the program by out-of-state subcontractors not disadvantaged by alleged past discriminatory practices in Dade County.

Finally, reliance by the lower courts upon the unwritten, non-binding promises of local officials that the preference program will end once black subcontractors receive 17% of County contracts is clearly an inadequate substi-

tute for the safeguards required of Congress by this Court in *Fullilove, supra.* The waivers available regarding black subcontractor goals are likewise only illusory protection from arbitrary County action because the County measures availability of black subcontractors on a national scale. In essence, the lower court's decision requires local black and non-black subcontractors to trust in the County not to violate their constitutional rights. The decision should therefore be reversed.

CONSCLUSION

For the foregoing reasons, the Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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